IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 77-1609

TERRY T. TORRES, *Appellant*,

v.

COMMONWEALTH OF PUERTO RICO, *Appellee*.

On Appeal From the Supreme Court of the Commonwealth of Puerto Rico

---

BRIEF FOR APPELLEE

HECTOR A. COLON CRUZ
Solicitor General

ROBERTO ARMSTRONG, JR.
Deputy Solicitor General
P.O. Box 192
San Juan, Puerto Rico—00902
Tel. (809) 722-4451

Attorneys for Appellee

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

TABLE OF CONTENTS

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 77-1609

TERRY T. TORRES, *Appellant*,

v.

COMMONWEALTH OF PUERTO RICO, *Appellee*.

On Appeal From the Supreme Court of the Commonwealth of Puerto Rico

---

BRIEF FOR APPELLEE

TO THE HONORABLE COURT:

This is an appeal from a Judgment entered by the Supreme Court of Puerto Rico on December 14, 1977, in Criminal Case No. Cr-77-24, The People of Puerto Rico v. Terry Terrol Torres Lozada.

The Judgment is found in the Appendix to the Jurisdictional Statement, Appendix B, Page 99, preceded by the Opinions of the Judges, Appendix A, pages 1-98.

COUNTER STATEMENT OF THE QUESTIONS INVOLVED

To the four questions presented by appellant a fifth question is added by appellee:

5. Whether appellant timely and properly raised before the Supreme Court of Puerto Rico the question of the conflict between Article V, sec. 4 of the Constitution of Puerto Rico and the Federal Supremacy Clause, Article VI, Cl. 2 of the Constitution of the United States.

COUNTER STATEMENT OF THE CASE

Appellee adopts appellant's statement as amended in its Motion to Dismiss or Affirm.

SUMMARY OF ARGUMENT

1. This Honorable Court is without jurisdiction to entertain the present appeal because appellant did not seasonably raise before the Supreme Court of Puerto Rico the federal questions upon which jurisdiction may be sustained and as a result an appealable final judgment or decree is not presented to the Court.

2. The question of Federal Supremacy, first raised by defendant on appeal, might be decisive in the case and a ruling thereon by the Supreme Court of Puerto Rico is essential to the formulation of a final judgment or decree appealable to this court.

3. Should the Puerto Rico Supreme Court, upon consideration of the issue, find that the Supremacy Clause bars the operation of Article V, Sec. 4 of the Puerto Rico Constitution, the four to three opinion entered in the case would render this case moot.

ARGUMENT

1. Whether This Court Has Jurisdiction to Entertain the Present Appeal.

In the present case, the jurisdiction of the Court depends on whether or not the judgment appealed is a final judgment or decree rendered by the Supreme Court of Puerto Rico in a case where is drawn the validity of a statute of the Commonwealth of Puerto Rico on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of the validity of the challenged statute.[1]

Prior to 1961 (year in which 28 USC 1258 was enacted) it had been repeatedly held by the Court of Appeals for the First Circuit that the final judgment or decrees entered by the Supreme Court of Puerto Rico would be received by that Court on appeal only if the

---

[1] 28 USC, Sec. 1258, which provides:

Final judgments or decrees rendered by the Supreme Court of the Commonwealth of Puerto Rico may be reviewed by the Supreme Court as follows:

1) By appeal, where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity.

2) By appeal, where is drawn in question the validity of a statute of the Commonwealth of Puerto Rico on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of its validity.

3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of the Commonwealth of Puerto Rico is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution treaties, or statutes of, or commission held or authority exercised under, the United States. Added Pub. L. 87-189, § 1, Aug. 30, 1961, 75 Stat. 417.

federal questions presented for review were seasonably raised before or considered by the Supreme Court of Purto Rico. *Colon-Rosich* v. *People of Puerto Rico*, 256 F. 2d 393 (1958); *Mario Mercado E Hijos* v. *Lluberas Pasarell*, 225 F. 2d 715 (1955) certiorari denied 76 S. Ct. 309, 350 U.S. 936, 100 L. Ed. 817, rehearing denied, 350 U.S. 977: *Prensa Insular de Puerto Rico* v. *People of Puerto Rico*, 189 F. 2d 1019 (1951); *Ramos* v. *Leahy*, 11 F. 2d 955 (1940); *Corretjer* v. *People of Puerto Rico*, 194 F. 2d 527 (1952).

It was also held that Section 1258 of Title 28 USC had the same meaning as 28 USC 1257, governing the review of decisions from state supreme courts. *Iglesias Costas* v. *Secretary of Finance of Puerto Rico*, 220 F. 2d 651 (1955).

Furthermore this Court has held that when a constitutional question is not timely raised in state court proceedings that question is not open in proceedings on petition for certiorari. *Ellis* v. *Dixon*, 349 U.S. 458, 99 L. Ed. 1231 (1955), rehearing denied 350 U.S. 855, 100 L. Ed. 759. *Flournoy* v. *Wiener*, 321 U.S. 253, 88 L. Ed. 708 (1944). See also *Corretjer* v. *People of Puerto Rico*, 194 F. 2d 527 (1952); *Prensa Insular de Puerto Rico* v. *People of Puerto Rico*, 189 F. 2d 1019 (1951).

And going one step further, this Court has held that the attempt to raise a federal question after judgment by the highest State Court, upon a petition for rehearing, comes too late, unless the court actually entertains and decides the question. *McCorquodale* v. *State of Texas*, 211 U.S. 432 (1908); *Forber* v. *State Council of Virginia*, 216 U.S. 396 (1910); *Consolidated Turnpike* v. *Norfolk & Ocean View Ry. Co.*, 228 U.S. 326 (1913); *Godchaux Co.* v. *Estopinal*, 251 U.S. 179 (1919); *American Surety Co.* v. *Baldwin*, 287 U.S. 156 (1932); *Herndon* v. *Georgia*, 295 U.S. 441 (1935); *Radio Station WOW* v. *Johnson*, 326 U.S. 120 (1945); *Hanson* v. *Denckla*, 357 U.S. 235 (1958).

In the instant case, the main federal question is the conflict between the Supremacy Clause and Article V, Sec. 4 of the Puerto Rico Constitution and this issue was not raised by appellant in his motion for reconsideration, at the time when he already had notice of the number of judges participating in the decision of his case and how they had voted. In fact, the Supremacy Clause conflict is not even raised in appellant's jurisdictional statement. It is in his opposition to the Motion to Dismiss that appellant raises the issue for the first time.

Obviously, the issue was never raised before or considered by the Supreme Court of Puerto Rico and the judgment entered is not an appealable judgment or decree under the provisions of 28 USC 1258.

As to the Puerto Rico Act, No. 22 conflict with the Federal Fourth Amendment, we show hereafter that the Supreme Court of Puerto Rico found for appellant and in fact, on that finding, ruled for a reversal of his conviction and for his acquittal, so, a decision on Federal Supremacy grounds would remove the Puerto Rico Constitution bar to a judgment on those terms on the basis of the four to three vote.

2. Whether Puerto Rico Constitutionally May Enact and Enforce a Law That Authorizes the Indiscriminate, Warrantless Search and Seizure, Without Probable Cause, of Persons and Property Arriving in Puerto Rico From Other Parts of the United States.

Since this question is answered in the negative by the four to three vote of the Supreme Court of Puerto

Rico, there is no controversy requiring adjudication by this Honorable Court. Appellant's thrust is based on the minority dissenting opinions, ignoring that of the majority which holds:[2]

> The second half of section 1 of Act. No. 22 (1975), provides that "in order to detain, question, and search persons" arriving from the United States, the Police must have grounds "to suspect [they illegally carry] firearms, explosives, depressants or stimulants or similar substances." Nevertheless, the first half of said section 1 empowers and authorizes the Police of Puerto Rico "to inspect the luggage, packages, bundles, and bags" of said persons without requiring reasonable grounds. In other words, it authorizes the Police to search the baggage, packages, bundles and bags of passengers indiscriminately. We do not see how this can be done without stopping the person. In fact, appellant was stopped when asked to accompany the agents with his luggage to the Criminal Investigation Bureau's office at the airport, without there being reasonable grounds to believe he was violating the law. Appellant had no alternative in view of said request.
>
> Neither the Fourth Amendment of the Federal Constitution nor Art. II, Sec. 10 of ours distinguish the search of persons from the search of their belongings with regard to the reasonability requirement. The Fourth amendment provides:
>
> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

[2] Jurisdictional Statement, Appendix A, at pages 22 to 24.

And Sec. 10 of Art. II of our Constitution provides:

> "The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated.
>
> "Wire-tapping is prohibited.
>
> "No warrant for arrest or search and seizure shall issue except by judicial authority and only upon probable cause supported, by oath or affirmation, and particularly describing the place to be searched and the persons to be arrested or the things to be seized.
>
> "Evidence obtained in violation of this section shall be inadmissible in the courts.
>
> In view of such clear constitutional provisions we must conclude that the searches authorized by Act. No. 22 are prohibited. A law, no matter how commendable its purpose might be, cannot authorize what the Constitution prohibits".

3. Whether Puerto Rico Constitutionally May Create a "De Facto" International Border Between Itself and Other Parts of the United States.

Here again, appellant argues against the minority opinions, ignoring the conclusions of the majority which clearly holds in the negative.[3]

> "Our geographic condition as an island does not justify making our case an exception to the Fourth Amendment. Neither will anyone argue that said exception would prove ineffective for Hawaii and Alaska due to the fact that they are not territories connected to the 48 continental states lying to the south of Canada and to the north of Mexico. Ha-

[3] Id. at pages 20 to 21.

waii is an archipelago more distant from the continent than Puerto Rico. Alaska is peculiar in that it is geographically separate from the other states and has a border with another country. Puerto Rico has no boundaries with other countries.

Besides, although we are an island, our seaports are not the major entries and exists to those traveling between Puerto Rico and the continent. Most people traveling to and from here do so by plane. When traveling by plane, it is irrelevant whether the surface flown over is land or sea. Thus the distinction that could be made regarding our condition as an island is unimportant. We are an island with regard to travel by sea. When traveling by plane there is no difference between going from here to Miami or from Miama (sic) to New York.

Finally, supposing that the Fourth Amendment were not applicable to Puerto Rico to the effects of Act No. 22 discussed here, we cannot disregard the fact that this prohibition would subsist under the Constitution of the Commonwealth which sets as a limit to the police action, apart from the specific prohibition against unreasonable searches, the principle of inviolability of human dignity. Constitutional guarantees were not adopted for a particular time and place. These principles are tested precisely when there is a rise in a certain type of crime and collective hysteria swells, and the courts of justice are the ones called upon to enforce them as essential values of the democratic order that we enjoy."

Adding, later on: [4]

"Another opinion delivered in this case defends the constitutional validity of Act. No. 22 under a theory which states that searches herein authorized may be considered part of the power of the Commonwealth to adopt inspection laws as part of

[4] Id., at pages 26 to 27.

its regulatory power called police power or state police power.

We are not discussing the power of the State and of the Commonwealth to adopt general inspection laws under the police power. We must understand, nevertheless, that the purpose of said laws is to authorize administrative inspections and not those with criminal purposes. None of the authorities cited: *Gibbons* v. *Ogden*, 9 Wheaton 1, 6 L. Ed. 23 (1824), *Brown* v. *Maryland*, 12 Wheaton 419, 6 L. Ed. 678 (1827); *Mayor of New York City* v. *Miln*, 11 Peters 102, 9 L. Ed. 648 (1837); *Patapsco Guano Co.* v. *Board of Agriculture*, 171 U.S. 345 (1898), *Compagnie Francaise* v. *State Board of Health, Louisiana*, 186 U.S. 380 (1902)—upon which said opinion is based—involve statutes authorizing the inspection of objects of persons directed to obtain evidence on criminal activity or to prevent it, as is the case of Act No. 22."

4. Whether Public Law No. 22, 25 L.P.R.A. § 1051, 1054, Unlawfully Abridges the Right to Travel by Subjecting Individuals to Indiscriminate, Warrantless Searches Without Probable Cause Upon Entry Into the Commonwealth of Puerto Rico From Other Parts of the United States.

Again, appellant fails to consider the holding of the majority that: [5]

"To interpret that where Act No. 22 'authorizes the search of passengers' suitcases, bags, and luggage without a search warrant or reasonable grounds, it is merely authorizing administrative inspections under the State's police power, would be to force the letter and spirit of the law beyond what is reasonably permitted. The searches authorized by said statute do not have the exclusive purpose of seizing objects. The facts of this case

[5] Id., at page 30.

demonstrate this Appellant was stopped, accused, tried, and convicted as a result of the search of his luggage conducted pursuant to said act. The police power of the state is not synonymous to the power of the police to stop persons and search them without reasonable grounds. The latter is what Act No. 22 authorizes against the clear constitutional provisions which forbid it".

5. Whether Article V, § 4 of the Constitution of the Commonwealth of Puerto Rico Violates the Due Process and Supremacy Clauses of the United States Constitution by Precluding the Supreme Court of Puerto Rico From Reversing Appellant's Conviction for Possession of Marihuana, Even Though a Majority of the Justices Who Heard the Case Were Convinced That the Conviction Was Obtained in Violation of the Fourth Amendment to the United States Constitution.

Article V, Sec. 4 of the Constitution of the Commonwealth of Puerto Rico reads as follows:

> "The Supreme Court shall sit, in accordance with rules adopted by it, as a full court or in divisions composed of not less than three Justices. No law shall be held unconstitutional except by a majority of the total number of Justices of which the Court is composed in accordance with this Constitution or with law."

The last sentence, now in question before this Honorable Court, was part of the original, text amended and approved by Congress by Joint Resolution of July 3, 1952, c 567, 66 Stat. 327. (See also 48 USCA, sec. 731d). But as is the case with all laws, whether federal or state, the statute must fit inside the framework of the Constitution of the United States, or perish.

The preceding three questions advanced by appellant were answered in the negative by four out of seven judges of the Supreme Court of Puerto Rico and, in

the decision of usual civil and criminal cases, this would have resulted in a reversal.[6] Not so in constitutional challenges, where an absolute majority (five judges out of eight) is required by Article V, Sec. 4 of the Puerto Rico Constitution.

But it is the primary responsibility of State Supreme Courts to read state statutes in a way consistent with the Supremacy Clause, Article VI, Clause 2, of the Federal Constitution.[7] When the facts of this case are tested against the Supremacy Clause, three questions inevitably arise:

> 1) Whether the four to three majority vacated appellants' criminal conviction, irrespective of the fate of Act No. 22 of August 6, 1975 (25 LPRA, secs. 1051-1054).

---

[6] Supreme Court of Puerto Rico, Rule 3(a), 4 L.P.R.A. Appendix 1-A which provides:

"Rule 3. Organization of the Court

(a) *Sitting in full*

The Court sitting in full shall take cognizance of the decision of all civil and criminal matters, and shall intervene in complaints against judges and in disciplinary proceedings against and rehabilitation of attorneys.

The decisions of the Court in full shall be adopted by a majority of the justices who participate, but no law shall be held unconstitutional except by a majority of the total number of justices of which the Court is composed.

For the issuance of a writ by the Court in full the votes of at least half of the justices who participate shall be required." (Emphasis supplied)

[7] "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

2) Whether the four to three majority against the validity of said Act No. 22 on Fourth Amendment grounds annulled that statute, anything in the Constitution or Laws of Puerto Rico notwithstanding.

3) Whether Art. V, sec. 4 of the Constitution of Puerto Rico is fatally unconstitutional.

We assume that, for the purposes of the Fourth Amendment and the Supremacy Clause, the term "state" includes Puerto Rico [8] and the Supreme Court of Puerto Rico is a "state court",[9] and, on that understanding, we invoke the principle that this Court should refrain from intervening in this case until the Supreme Court of Puerto Rico has had the opportunity to answer the three questions arising out of the interaction between Puerto Rico's Act 22 and Constitutional Art. 5, Sec. 4, on one side and the Federal Fourth Amendment and Supremacy Clause on the other side.

As appellant admits in its Jurisdictional Statement, at page 20:

"On April 14, 1978, appellant filed an untimely motion for reconsideration in the Supreme Court of Puerto Rico. The motion alleged that an opera star had recently been searched pursuant to Public Law 22, that the search had generated much publicity and that a newspaper reported that Mr. Justice Rigau had stated that he is now prepared to vote on the constitutionality of Public Law 22. The motion asked that the Court allow Mr. Justice

[8] *Examining Board* v. *Flores de Otero*, 426 U.S. 572, 599 (1976); *Calero Toledo* v. *Pearson Yatch*, 416 U.S. 663, 668 (1974), note 5.

[9] *Allen Corp.* v. *Mejías*, 165 F. Supp. 221 (1958), affirmed 267 F. 2d 550; *RCA del Caribe, Inc.* v. *Silva Recio*, 429 F. Supp. 651 (1976).

Rigau to vote and that it reconsider its interpretation of Article 5 § 4 of the Puerto Rico Constitution. On May 4, 1978, the motion was denied."

These issues are not the ones upon which the appeal is based. The main issue on appeal is whether Article V Sec. 4 of the Puerto Rico Constitution, as applied in this case, conflicts with the Supremacy Clause. That issue has not yet been raised before the Supreme Court of Puerto Rico and until that tribunal decides that issue this case is not ripe for review by this Supreme Court of the United States.

Provisions similar to those of Article V, Sec. 4, appear in the constitutions of several states and their validity has been sustained by this Honorable Court. See *Ohio ex rel Bryant* v. *Akron Metropolitan Park District*, 281 U.S. 74 (1930), *City of Bismarck* v. *Materi*, 177 N.W. 2d 530, 537 (1970), *Funkhouser* v. *Spahr*, 102 Va. 306 46 S.E. 378 (1904). North Dakota, Arizona, Virginia and Colorado have very similar provisions.

On the above, we respectfully submit that Article V, Sec. 4 of the Puerto Rico Constitution is not invalid on its face and that the Supreme Court of Puerto Rico has not been given an opportunity to accommodate it within the framework of the laws and the Constitution of the United States.

CONCLUSION

On the undisputed facts of this case and for the reasons presented above, it is respectfully requested that this appeal be dismissed for failure to present a final judgment or decree appealed on questions of law seasonably presented to or considered by the court below,

or provide such other disposition of the appeal as this Honorable Court may deem proper.

Respectfully submitted,

HECTOR A. COLON CRUZ
Solicitor General

ROBERTO ARMSTRONG, JR.
Deputy Solicitor General
P.O. Box 192
San Juan, Puerto Rico—00902
Tel. (809) 722-4451

Attorneys for Appellee